No. 4890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. D. PINE,

Appellant,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the East Bay Municipal Utility District, JOHN H. KIMBALL, Individually and as Secretary of said District, and of the Board of Directors thereof, and GEORGE C. PARDEE, as President of the Board of Directors of said District,

Appellees.

APPELLANT'S OPENING BRIEF.

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Table of Authorities Cited

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APPELLANT'S OPENING BRIEF.

I.

STATUS OF PLEADINGS.

On September 25, 1925, the appellant filed his bill in the District Court to enjoin the defendants East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as directors of the district, John H. Kimball, individually and as

secretary of the district and of its Board of Directors, and George C. Pardee as president of the Board of Directors of the district, from entering into certain contracts with the other defendants. On February 8, 1926 the defendants whom we have just named served and filed a notice of motion and a motion to dismiss appellant's bill of complaint. Also on February 8, 1926, the same defendants served and filed a notice of motion and a motion for "further and better particulars under equity rule No. 20". Thereafter, on March 5, 1926, the appellant served and on March 10, 1926 filed a notice of motion and a motion for leave to file an amended and supplemental bill of complaint; and the proposed amended and supplemental bill was attached to the motion. The defendants' motions were noticed for February 15, 1926; the appellant's motion was noticed for March 15, 1926; and all motions were heard together on the latter date. On March 20, 1926, the District Court made and entered its minute order as follows (Trans. page 55):

"Plaintiff's motion for leave to file amended and supplemental complaint and defendants' motion to dismiss, heretofore argued and submitted, being now fully considered, it is ordered that plaintiff's motion for leave to file amended and supplemental complaint be and the same is hereby denied and defendants' motion to dismiss be and the same is hereby granted, and that a decree of dismissal be entered herein accordingly."

The minute order was followed by the decree on April 22, 1926, as follows (Trans. page 56):

"This cause having been heard upon plaintiff's bill of complaint and upon motion of defendants East Bay Municipal Utility District and the officials thereof to dismiss the same, and upon plaintiff's motion for leave to file amended and supplemental bill of complaint, and said motion to file said amended and supplemental bill of complaint having been denied and said motion to dismiss said bill of complaint having been sustained and the Court having ordered that the decree of dismissal be entered accordingly,

Now, therefore, it is by the Court ordered, adjudged and decreed that said bill of complaint and the above-entitled action be and the same are hereby dismissed."

The district judge rendered no opinion. So we do not know officially why the District Court denied appellant's motion for leave to file his proposed amended and supplemental bill. But Equity Rule No. 28 in part reads thus:

> "After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the Court or judge."

And Equity Rule No. 34 reads thus:

> "Upon application of either party the Court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent Court rendered after the commencement of the suit, determining the matters in controversy or a part thereof."

Therefore we must and do assume that in denying appellant's motion the District Court did not act on any technical grounds *but rather acted on the ground that the motion of the defendants to dismiss appellant's bill would be equally good against appellant's proposed amended and supplemental bill*—in which event appellant's motion should be denied as matter of course, though otherwise it should be granted and the defendants given leave to plead to the new bill.

Accordingly in the statement of facts and in the arguments which follow we treat this case as though appellant's proposed amended and supplemental bill were the original bill and the defendants' motion to dismiss were directed to it.

The motion to dismiss admits the allegations in the bill and therefore the following statement of facts is merely a summary of the pertinent allegations in the proposed amended and supplemental bill.

II.

STATEMENT OF FACTS.

The plaintiff is a citizen of California, and a resident of the defendant district. He is also a registered elector, owner of real estate and a tax-payer within the district. He has paid taxes to this district. The taxes which he has paid are small; and we will admit, as perhaps we must admit on our pleading, that the total taxes which plaintiff will ever have to pay because of the proposed operations of the district under challenge in this suit will never reach the sum of $3000.

The defendant, East Bay Municipal Utility District, is organized under an act of the California legislature approved May 23, 1921 and found in the statutes for that year at page 245. The district's organization dates from May 22, 1923. The act applies primarily to incorporated territory. In this instance the defendant district is comprised wholly of incorporated areas—principally Alameda, Oakland, Berkeley and Richmond on the east bay-shore of San Francisco Bay. The legislature at the same session passed an almost identical act for use in unincorporated areas to accomplish the same purposes. (Statutes 1921, page 906.) This latter act has been before our Supreme Court in *In re Issuance of Bonds of Orosi Public Utility District,* 69 Cal. Dec. 447. Therein the Court, in determining the nature of these districts, declared that they are not mere state agencies for limited purposes like our reclamation and irrigation districts but are true municipal corporations. We quote from page 456:

> "The creation of municipal corporations does not have for its sole object the formation of political subdivisions of the state for governmental purposes, but there is also the association of the members of the particular community for the administration of their local business and affairs in matters largely outside of the sphere of government as such. It is quite apparent to us that the legislature had in view such association of the people living in the outlying districts when it enacted the statute providing for the formation of public utility districts in the unincorporated territory of the state."

In other litigation the present defendant has claimed, under this decision, to be a municipal cor-

poration. So we assume that this will not be disputed.

After organization the district proceeded under its statute to develop a water supply for the district. The district's engineer proposed the construction of a dam on the Mokelumne River at a point east of Stockton in the lower hills above the town of Lancha Plana whereby large quantities of water would be impounded; and he further proposed the installation of a large conduit to carry the water to small reservoirs in the hills within or adjacent to the district. In this connection we allege:

"That said project * * *, by and through the construction of said dam, involves the appropriation and use of several hundred acres of lands belonging to the United States of America * * * that said dam, if constructed, will be located upon said lands of the United States and said reservoir above said dam will also be partly located upon said lands of the United States; that the only available damsite which is suitable for the purposes of the district and for the construction of a dam on the Mokelumne River to provide said reservoir at said reservoir-site is on said land of the United States; that the construction of any dam on said Mokelumne River which will create said reservoir will necessarily include said lands of the United States in said reservoir." (Trans. pages 36 and 37.)

The entire reservoir at Lancha Plana will comprise about 2000 acres of land. (Trans. page 34.)

The directors of the district adopted the engineer's proposals and submitted to the voters in the district the question whether or not this project should be constructed and bonds issued to finance it. With the able help of our Supreme Court the voters of the district gave the necessary affirmation. (See *In the Matter of the Validation of the East Bay Municipal Utility District Water Bonds of 1925, etc.,* Cal. Dec. Vol. 70, page 270.)

The district's officials then called for bids on various portions of the project. They specified that the bids should be opened on September 4, 1925, and the contracts awarded on September 25, 1925. One portion of the project for which they called for separate bids was "items 1 to 16 inclusive, covering the Lancha Plana Dam, outlets through dam, including gates and power house * * *, the same being Schedule 10 of Plan 1 of the specifications covering said work." (Trans. page 42.) The defendant Lynn S. Atkinson bid on this portion of the project. On September 25, 1925, while the bids were pending and before any contracts thereon were awarded the plaintiff filed his bill in this suit and served process upon the defendant district and its officials. (Trans. page 41.) The district, its officials, and Atkinson (and also others) were made parties to the original bill. (Trans. pages 1 and 2.) Yet, at a meeting later on that day, the district's directors awarded to defendant Atkinson the contract on the above specified portion of the project.

Meanwhile the district had applied to the Federal Power Commission, under the Federal Water Power

Act, for a permit and license to construct the dam, power house and reservoir upon the lands of the United States. When the district awarded the contract to Atkinson this application was undetermined. (Trans. page 37.) Consequently, when on November 6, 1925 (Trans. page 42) the district and Atkinson finally signed the contract between them they inserted this paragraph:

"Anything in said specifications to the contrary notwithstanding the work provided for by this contract shall be commenced by second party within thirty days after but not before receipt from the district in writing of notice so to do in conformity with the provisions of this paragraph and the period within which the work shall be completed as provided in the said specifications shall begin with the receipt by second party of such notice. In view of the fact that the application of the district for the use of the lands upon which said dam is to be constructed is still pending and undecided before the Federal Power Commission and in view of the further fact that it may become necessary and desirable to make some substantial alterations in the plans and specifications for said dam, it is distinctly understood and agreed that the said district need not give the said notice in writing to begin said work for a period of 12 months from and after the date hereof and during said period of twelve months may at its option terminate and cancel this agreement without liability in any way to the said second party. If the said notice to begin said work be not given within said period of twelve months, then in that event at the expiration of said time the

said contractor may at his option terminate and cancel this agreement without liability to the district."

We note that the twelve months' period has not elapsed. The *contract price* was $3,081,378.00.

Other important facts are:

(a) The *bid* of Atkinson exceeded $3000. (Trans. page 48, Par. XXI.)

(b) His contract remains in full force and effect and no notice of termination of it has been given; but no work has been done under it. (Trans. page 46.)

(c) (Trans. pages 48 and 49, Par. XXII.) We here allege:

"That this suit in equity is brought on behalf of plaintiff and of all of the taxpayers for district purposes who own any property within said district which is subject to taxation and is taxed for said district purposes and is brought and prosecuted to protect said district against an illegal application and disposition of the funds and property of the district by the directors and officials thereof; that said taxpayers are entirely too numerous to be made parties to this suit; that their interest in the matters herein involved and alleged is identical with the interest of plaintiff in said matters."

(d) If any permit or license is issued to the defendant district by the Federal Power Commission then the district will notify the defendant Atkinson to proceed with performance of his contract and payments to him thereunder will begin. (Trans. page 49, Par. XXIV.)

(c) (Trans. page 50, Par. XXVI.) We here allege:

"That the statute under which the defendant district is organized does not authorize or empower said district to give away, sell, or otherwise dispose of any property or funds of the district which are necessary for the purposes and uses of the district and does not authorize or empower said district to subject to a forfeiture or loss or a taking from the district any property or funds of the district which are necessary for the purposes and uses of the district. * * *"

III

FURTHER FACTS.

Both the original and the proposed amended and supplemental bills contain many other allegations of facts which present important issues of law. But on this appeal such facts and the issues of law which they raise are immaterial. We have alleged them solely on the principle that once the Federal Court has laid its hold on a controversy because some phase of the dispute or the parties thereto give it jurisdiction it will hear and determine all issues.

IV

STATEMENT OF FEDERAL QUESTIONS.

Our statement of the Federal questions that this suit involves is (Trans. pages 50-52):

"That if said Federal Power Commission shall issue any permit or license to said defendant district and said defendant shall construct said dam and reservoir and said tunnel and aqueduct under the terms of said contracts, or otherwise, it will be questionable, because of the terms of the Federal Water Power Act and the terms of the statute under which defendant is organized, *first,* whether or not the said dam, reservoir, tunnel, and aqueduct to be constructed under said contracts may be lawfully constructed, owned, maintained, or used as against the United States of America by defendant district, *second,* whether or not any such permit or license will be legal and valid, *third,* whether or not the taking of such permit or license and any compliance therewith and any construction of dam, reservoir, tunnel and conduit thereunder, will not unlawfully subject the property and funds of the district, which are necessary for the purposes and uses of the district, to a forfeiture or loss, or a taking from the district through the United States of America.

That plaintiff therefore alleges that the following Federal questions are involved herein:

(a) Whether or not the said dam, reservoir, tunnel and aqueduct to be constructed under said contracts can be lawfully constructed, owned, maintained or used as against the United States of America.

(b) Whether or not any such permit or license will be legal and valid.

(c) Whether or not the taking of such permit or license and any compliance therewith and any con-

struction of dam, reservoir, tunnel and conduit thereunder will not unlawfully subject the property and funds of the district, which are necessary for the purposes and uses of the district, to a forfeiture or loss, or a taking from the district through the United States of America.

(d) Whether or not the proposed conduit can be built across said San Joaquin Delta as herein described without the permission of the California Debris Commission first had and obtained.

(e) Whether or not the proposed conduit can be built across the San Joaquin Delta as herein described without the consent of the War Department of the United States first had and obtained.

(f) Whether or not the Federal Power Commission can issue any permit or license to said district for the use of said federal lands for the purposes for which said district proposes to use the same.

(g) Whether or not the Federal Power Commission can issue a license under the Federal Water Power Act where the applicant, under its organic act, cannot accept the provisions of Section 14 of the Federal Water Power Act.

(h) Whether or not said Federal Power Commission can issue a license to an applicant which, under its organic act, cannot subject its property to the acquisition, forfeiture, control and appropriation by the United States as provided under the terms of the Federal Water Power Act."

On this appeal we eliminate (d) and (e) from consideration.

V

STATEMENT OF LEGAL ISSUES AND SPECIFICATION OF ERRORS.

In the brief of the defendant district in the lower Court the district's counsel stated the issues on defendant's motion to dismiss in these words:

(a) "That the facts alleged do not constitute a valid claim in equity."

(b) "That the complainant is not a proper party in interest."

(c) "That the matter in controversy does not exceed the sum of $3000."

(d) "That the matter in controversy does not arise under the constitution or laws of the United States."

We have not followed his order of statement, however. For, as we shall see, the last three issues go to the general question whether or not the Federal Courts have jurisdiction of this controversy, and that question cannot be answered unless we have first ascertained whether or not the plaintiff has stated a cause of action in equity and what the nature of such cause of action is, if one exists. For this reason we will discuss the issues in the above order.

Any specifications of errors, in this brief, as required by the rules of this Court, can do no more than say that, since the issues on the motion were as defendants' counsel stated them and since the order granting the motion to dismiss was general, the conclusion must be that the motion to dismiss was granted upon all four grounds and therefore the Court erred in deciding each of these four issues against

this appellant. The assignment of errors in the transcript covers, in various ways, these four issues (Trans. pages 58-63) and we therefore incorporate herein by reference our assignment of errors which we filed on taking this appeal.

VI.

FIRST QUESTION.

DO THE FACTS ALLEGED CONSTITUTE A VALID CLAIM IN EQUITY?

Our case may be shortly stated in these propositions:

(a) The statute under which the defendant district is organized does not authorize or empower the district to give away, sell or otherwise dispose of any property or funds of the district which are necessary for the purposes and uses of the district and does not authorize or empower the district to subject to a forfeiture or loss or a taking from the district any property or funds of the district which are necessary for the purposes and uses of the district.

(b) The entire dam, reservoir, diversion works and conduit of the district's Mokelumne River project are necessary for the purposes and uses of the district.

(c) The Mokelumne River project of the defendant district, as proposed by its engineer, adopted by its Board of Directors, approved by its voters, and included in the Atkinson contract, is incapable of use unless the entire dam and a portion of the reservoir and a part of the diversion works are located upon

lands of the United States within the jurisdiction of the Federal Power Commission.

(d) A license from the Federal Power Commission to the defendant district will constitute a contract between them.

(e) The terms of any license from the Federal Power Commission to the defendant district will and must provide for a sale and other disposition, and for a forfeiture and loss of property and funds of the district which are necessary for its purposes and uses.

(f) The construction of the dam and diversion works on lands of the United States, even though not done under any license from the Federal Power Commission, will entail a disposition, forfeiture and loss of property and funds of the district which are necessary for its purposes and uses.

(g) What the district proposes to do, by and through its contract with Atkinson and under its license from the Federal Power Commission, will be a violation of its organic act in disbursing the funds of the district and also will be a waste of the district's funds.

(h) Any license from the Federal Power Commission to the district will be invalid because of the inability of the commission to issue a license upon the only terms which the district may lawfully accept and because of the inability of the district to take a license upon the only terms which the commission may lawfully grant.

So of each of these propositions in their order:

(a) The Statute Under Which the Defendant District is Organized Does Not Authorize or Empower the District to Give Away, Sell or Otherwise Dispose of Any Property or Funds of the District Which Are Necessary for the Purposes and Uses of the District and Does Not Authorize or Empower the District to Subject to a Forfeiture or Loss or a Taking From the District Any Property or Funds of the District Which Are Necessary for the Purposes and Uses of the District.

Section 12 of the District Organic Act specifies the powers which the district may exercise. Among them only three bear on our question. They are:

> "FOURTH. To take by grant, purchase, gift, devise, or lease or otherwise acquire, and to hold and enjoy, and to lease or dispose of, real and personal property of every kind within or without the district *necessary to the full or convenient exercise of its powers.*"
>
> "FIFTH. To acquire, construct, own, operate, control or use, within or without, or partly within and partly without, the district, works for supplying the inhabitants of said district and municipalities therein, without preference to such municipalities, with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the disposition of garbage, sewage, or refuse matter; and to do all things necessary or convenient to the full exercise of the powers herein granted; also to purchase any of the commodities or services aforementioned from any other utility district, municipality, or private company, and distribute the same. Whenever there is a surplus of water, light, heat or power above that which may be required by such inhabitants or municipalities within the district, such district shall have power to sell or otherwise dispose of such surplus outside of the district to persons, firms, and public or private corporations or municipalities outside said district."

"TENTH. To make contracts, and to employ labor, and to do all acts necessary *and convenient for the full exercise of the powers herein in this act granted.*"

A district of this sort is not organized to buy, own or sell property or to make contracts. With this district such things are only a means to an end. Therefore, such things are only justified to the extent that they are a means to an end. Sub. 4th of Section 12 expresses this idea by granting the power of the district to buy, own and sell property in those cases where the exercise of that particular power is *"necessary to the full or convenient exercise of its powers"*; and Sub. 10th of Section 12 further expresses the same idea by granting power to the district to make contracts in those cases where the exercise of that particular power is *"necessary and convenient for the full exercise of the powers herein in this act granted." The consequence is that we have to look to other portions of the act to determine what main powers are possessed by the district which may be so aided by the exercise of the subsidiary powers granted to it by Subdivisions 4th and 10th of Section 12.*

The main power and purpose of the district is declared in Sub. 5th of Section 12 in these clear words:

"to acquire, construct, own, operate, control or use, within or without, or partly within and partly without, the district, works for supplying the inhabitants of said district and municipalities therein, without preference to such municipalities, with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the disposition of garbage, sewage, or refuse matter."

Thus it is the bounden duty and purpose of the district to acquire, by construction or purchase or by both, and thereupon to operate, for the benefit of the district, its inhabitants, businesses, industries, schools and all other activities in need of such service, utilities supplying light, water, power, etc.

Sec. 15, Sub. 1 of the district's Organic Act also provides:

> "That no public utility shall ever be acquired or contracted for unless the acquisition of said utility has first been approved by a majority of the electors of said district."

Now, with these premises before us, let us suppose that the district, by one means and another, has acquired and has begun to operate a system of waterworks supplying the people in the district with water. Let us suppose further that the directors eventually get tired of their job and decide to sell the system to someone who will cease to supply the people in the district with water and who will turn the works to similar service in another locality. Could the directors legally do so? Most certainly not. Such sale of the works would subvert every purpose of the district's Organic Act. It would betray the trust which the statute imposes upon the directors. Such disposition of the property of the district would not be "necessary to the full or convenient exercise of its powers" and for that reason would not be authorized by Sub. 4th of Section 12.

If, now, we carry this idea further back and assume that the directors propose to acquire by construction

or purchase or both such system of waterworks under a contract *whereby, under a number of different contingencies and finally at a definite date, someone can take the works from the district at a price, can cease to supply the people in the district with water, and can turn the works to similar service in another locality,* must we not equally say that such use of the funds of the district will subvert every purpose of the district's Organic Act? We most certainly must. Such disposition of the funds of the district would not be "necessary and convenient for the full exercise of the powers herein in this act granted"; and for that reason would not be authorized by Sub. 10th of Section 12.

This conclusion is very strongly supported by other clauses in the statute which we have already quoted. One clause is (Sec. 15, Sub. 1) that a public utility may be acquired only on a vote of a majority of the electors of the district. But if such vote is necessary for the acquirement of this utility it can hardly be said that the statute intends that the Board of Directors may dispose of the utility if it pleases to do so. Rather, the necessary implication is that when a utility has been acquired under a vote of the people the Board of Directors is without power to dispose of it. This conclusion has further confirmation in that part of Sub. 5th of Section 12, which says:

> "Whenever there is a *surplus of water,* light, heat or power *above that which may be required by such inhabitants or municipalities within the district,* such district shall have power *to sell or otherwise dispose of such surplus outside of the*

district to persons, firms and public or private corporations, or municipalities outside said district."

Where the statute grants a special authority to dispose of surplus water or power to outsiders it must do so on the ground that otherwise the district cannot make such disposition. *But if the district cannot dispose of the surplus without special authority certainly it cannot dispose either of needed water or power or of the property which produces such needed water or power unless the statute also grants the district special authority to that effect.* While, under this statute, special authority is granted for disposition of surplus away from the district there is no such special authority granted for like disposition of needed water or power or of the property which produces them. Hence we must conclude that authority to accomplish the latter does not exist.

In this very connection it is important to note that Sub. 5th of Section 12, wherein we find the main power and purpose of the district, *does not give any authority to dispose of the district's works.* That clause gives only authority *to acquire.* The words are, "to acquire, construct, own, operate, control or use * * * works," etc. This indicates that it is not one of the powers or purposes of the district "to lease or dispose of" works, etc.

Every step in the foregoing line of reasoning is affirmed by the authorities.

The principles which we invoke are well stated in a South Dakota case. We here put this case first

because the charter of Huron, S. D., had in it certain clauses nearly identical with the clauses in our statute. The case is *Huron Waterworks Co. v. Huron* (S. D.), 30 L. R. A. 848, at 854. The city's charter provided:

> "Section 1 provides: 'That the city of Huron * * * shall have power to make all contracts necessary to the exercise of its corporate powers, to purchase, hold, lease, transfer, and convey real and personal property for the use of the city * * * and to exercise all the rights and privileges pertaining to a municipal corporation.'
>
> Section 7, pt. 8, provides as follows: 'The city council shall have power * * * to organize and support fire companies, hook and ladder companies, and provide them with engines and all apparatus for extinguishment of fire * * * to construct and furnish reservoirs, wells, cisterns, aqueducts, pumps, and other apparatus for protection against fires, and to establish regulations for the prevention and extinguishment of fires.'
>
> Section 7, pt. 9, provides as follows: 'The city council shall have power * * * to construct and maintain waterworks and make all needful rules and regulations concerning the distribution and use of water supplied by such waterworks.' "

Two excerpts from the court's opinion are enough. Page 857:

> "From this examination of the authorities, we conclude that there is no distinction between the nature of waterworks property owned and held by the city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, courthouses, fire engines, and apparatus, and other property owned and held by the city for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common council of the city, except under the authority of the state legis-

lature. Such property, as before stated, is private property, in the sense that the municipality cannot be deprived of it without compensation, no more than can a private corporation be deprived of its property by law-making power. But such property is so owned and held by the municipality as the trustee of the citizens of the municipality for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the taxpayers of the city, for their use and benefit, and the law will not permit the corporation to divest itself of the trust, nor to deprive the citizens of their just rights as beneficiaries in the same."

Page 858:

"The common council of the city of Huron was, to a certain extent, at least, but agent of the corporation, and possessed only such authority as was conferred upon it by its charter. While it probably possessed the power of disposing of strictly private property held by the city, and not held for public use, and therefore not charged with a trust, it did not possess the power to dispose of the city waterworks constructed by the corporation and held for public use; *and the power conferred by the first section of its charter to sell and dispose of the property of the city must be held to be limited to that class of property held as strictly private property, and not charged with any public use.*"

Another case is *Ogden City v. Bear Lake and River Waterworks and Irrigation Co.* (Utah), 41 L. R. A. 305, at 309. A rather lengthy quotation from the opinion makes exposition here unnecessary. The Court said:

"As to the first proposition in the order we will consider them. Was the City of Ogden authorized to enter into a contract transferring its rights

to the waters and system in question to the defendants or either of them? Ogden City was a public corporation, and its authority was limited to such powers as were expressly granted by statute and such as might be necessary to those expressly given. Undoubtedly, water distributed to a city and its inhabitants is devoted to a public use, and the entire system, whether consisting of reservoirs, conduits, pipes, or other means used to accomplish the delivery, is also dedicated to the same use. The charter of Ogden City contained a provision authorizing it to 'purchase, receive, hold, sell, lease, convey and dispose of property real and personal for the benefit of the city.' *No authority is expressly or by necessary implication given to convey, transfer, or lease to a private corporation, or other person, property used by the public—dedicated to a public use.* The control and management of property dedicated to the use of the people of a city is given for their benefit, not for the individual benefit of the public authorities. A public corporation is not a legal entity or person, whose interests can be considered separate and apart from its people. It is but an instrumentality created and perpetuated for their benefit. Its officers as such are nothing more than agents of the public. They must act within the scope of their authority. Their acts outside are perfectly impotent from a legal standpoint. Their authority and control of the property and rights of the corporation used by the people are not given them for the purpose of being transferred to a private corporation, or anyone else, to enable them in that way to deprive the public of its use; nor can the city authorities divest the city of its rights to it, and in that way rid themselves of the management and control of it for the city and its inhabitants. They cannot deprive the public of the benefit of property rights or powers affected with a public use by conveying or leasing it to others, unless their charter specially authorizes it, though such other corporation or person

may undertake to give the public the use of it for compensation deemed reasonable. Such officers are selected by the people, to whom they are responsible, and they may be removed and superseded by others. While the use of public property is controlled and managed by public officers, whatever compensation is received goes into the public treasury; and, if the compensation exceeds the actual cost the public gets the benefit of the surplus or net income. When property whose use is devoted to the public is conveyed or leased to private corporations, though a contract may require its use to be given to the public for a reasonable remuneration, the public, to a great extent, loses its control over it, and any net income realized goes into the hands and pockets of private parties. In fact, such parties cannot give the use of their property to the public for the actual cost of it, and the actual expense of the business, as in this case. They must have profits, and it is to the interest of such parties to make the profits or net income as large as public officials will consent to make it. The people usually get fleeced when the city places its waterworks in the hands of private parties. Public-spirited men are not at all times free from the undue influence of self-interest. Their disposition to favor the public is not equal to their inclination to favor themselves. Such are the leanings of human nature, even when engaged in public-spirited projects. A city sometimes has on hand personal and real property not devoted to the use of the public. Fire engines, horses, or other personal property, may become unsuited to the use for which they were designed, and be replaced, and ceased to be used. Public buildings may become unfit for the public use, and for sufficient reasons the city may not wish to build on the same lot; and such buildings, and the lots upon which they stand, may be no longer used by the public. The city from time to time may have other classes of property that have ceased to be

used, or is not used by the public. All such property of a municipal corporation, not devoted to the public use, may be sold or leased under the general authority to sell or lease, as the public welfare may demand. Such property may be converted into money or other things, and in that form devoted to the use of the public. But property devoted to a public use cannot be sold or leased without special statutory authority. It follows that the writing purporting to grant to John R. Bothwell the right of Ogden City to furnish water to it and its inhabitants, and to lease to him its water rights, as long as he or his assigns should furnish water to it, and the resolution of its city counsel purporting to turn over to the Bear Lake & River Waterworks Company the waterworks system of the city, were absolutely void, because made without authority of law."

A third case is *Lake County, Etc., Co. v. Walsh,* 65 N. E. 530. We need only to quote from the opinion, page 532:

"The statutes bearing upon the question of the power of cities incorporated under the general laws of this state to sell property held by them are the following: Section 3548 declares that any city owning real estate shall have power to sell and convey the same as the common council may deem expedient. Section 3549 provides that such sale must be authorized by a vote of two-thirds of the members of the common council. Section 3550 requires that the real estate to be sold shall first be appraised by three disinterested freeholders of such city, to be appointed by the judge of the Circuit Court of the county in which such city is situated. Section 3541, clause 45, authorizes the city to purchase, hold, or convey real estate for the purpose of constructing public buildings thereon, or using the same for a public park, or other public purpose. Section 3541, clause 47, provides that the common council may, upon the

petition of a majority of the legal voters of the city, sell any public square or public landing of such city, or part thereof, and convey the same by deed; the moneys arising from such sale to be deposited in the city treasury to be expended in the purchase of any other public square, or public landing, and for the improvement of the same. Section 3550a (Acts 1895, p. 151) gives to the common council of certain small cities the power, by a vote of a majority of its members, to sell and convey to any corporation or body politic, any public square, market square, market place, fractional piece of ground, or public park owned or held by such city, or within its corporate limits, to be held by such corporation or body politic, and devoted to any public purposes. Sections 3548-3550, 3541, cls. 45, 46, 3550a, Burn's Rev. St. 1901 (sections 3111-3113, 3106, cls. 45, 47, Rev. St. 1881; sections 3111-3113, 3106, cls. 45, 47, Horner's Rev. St. 1901). The first three of the sections above referred to evidently relate to real estate held by the city for private purposes only. None of the other enactments purports to authorize the sale of any property held for public use, except such as is expressly mentioned in their provisions. *These statutes clearly indicate that the power of a city to sell property devoted to any public use is restricted, and that, to enable a city to make a sale of such property, special authority must be granted it by the legislature.* Property so held is held upon a trust for the benefit of the inhabitants of the city; and the city, as the trustee for such use, cannot, by its unauthorized act, destroy the trust."

The three cases which we have now presented cite a great many authorities—both opinions of courts and texts of leading legal writers—in support of these principles.

All three courts held that the general power to sell and convey property, as granted to the city in each instance, was exercisable only for the disposition of property which was not affected with a public use and that any sale or conveyance of property under public use could be made only under express and direct authorization by the legislature—an authorization which would have to state directly that property then in public use and accurately described in the legislative enactment could be disposed of in a specified manner.

In the last published volume of the American Law Reports, Volume 39, at page 206, there is reported an Oklahoma case, which fully supports our position on this question. It is *City National Bank v. Kiowa.* A few quotations from the opinion will suffice.

> (a) "Therefore, since Section 6, art. 18, Const. is a grant of power to municipalities in furtherance of public policy, and since the impairment or destruction of public service, or the diversion of public funds to purposes other than those for which they are voted, are clearly obnoxious to the public policy of the state, authority of the incorporated town of Kiowa to sell its water and light plant must be found, if it exists, in the language of some express statute."
>
> (b) "It is only when the public use has been abandoned, or the property has become unsuitable or inadequate for the purpose to which it was dedicated, that a power of disposition is recognized, in the corporation."
>
> (c) "It would open a door for the exploitation of the public through collusive sales of municipally owned public utilities. Not that this result would follow in any particular case, but that it might do so is sufficient reason for the public policy which forbids it."

(d) "It is therefore concluded that no express or implied power has been vested in municipal authorities in this state to sell or otherwise dispose of a municipal water and light plant, acquired under Section 27, art. 10, Const., unless the same has been abandoned as a public utility, or has become inadequate and is not adapted to the public uses for which it was originally intended."

(e) "Public policy forbids that a public utility such as this shall be impaired or destroyed wilfully, or that private rights shall be acquired therein, the enforcement of which will have this result."

There is a very full note in connection with this case and in the very first paragraph of this note the author of it summarizes the law of the United States in these words:

"In this country, however, it is generally held that a municipal corporation has no implied power to sell property which is devoted to a public use; such property, even if the title is in the municipality, is held in trust for the people of the state as a whole, *and cannot be alienated except by the express consent of the legislature or upon the discontinuance of the public use in the manner provided by law.*"

Later in this brief we will quote a number of California statutes which, in general terms, authorize disposition of property not needed for public purposes. *But at this place we want to note the essential distinction between an authorization to sell property no longer needed for public use and an authorization to sell property which is still needed for such use. For the former only a general legislative enactment is re-*

quired—a grant of power in advance to sell unneeded property at any time. But for the latter, according to the cases, a special legislative act is necessary whereby, in terms, a disposition of particular property in public use is permitted.

We have not discovered, after careful search, any California case which treats as squarely of the problem as the three cases we have noted. Yet our reports are not without cases which make it plain that these same principles are law with us.

Hoadley v. San Francisco, 50 Cal. 265 at 275 and 276:

> "The legal title to the squares, as already stated, vested in the city by the operation of the act of Congress of July 1, 1864. Admitting it to be true, that ordinarily the statute of five years is applicable in respect to lands to which the city holds the title, as was decided in this court in *Calderwood v. San Francisco* (31 Cal. 588), is that statute applicable in this case? Was the legal title which the city held extinguished by the adverse possession of the plaintiff for a period of five years after the passage of the act of Congress of July 1, 1864? The title which the United States held in the land, and which was transferred to the city by the act of Congress, was so transferred to the city in trust, for the purposes expressed in the statute of March 11, 1858, above referred to, and for no other purpose. That is to say, the title was granted to the city in trust, for public use; and the city had no authority, by virtue either of the statute of March 11, 1858, or of the act of Congress of July 1, 1864, to alienate or in any manner dispose of it, but only to hold it for the purposes expressed in the statute. It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to pri-

vate persons, and is effectually withdrawn from commerce; and the city having no authority to convey title, private persons are virtually precluded from acquiring it. The land itself, and not the use only, was dedicated to the public. Land held for that purpose, whether held by the state or a municipality, in our opinion, is not subject to the operation of the Statute of Limitations."

County of Yolo v. Barney, 79 Cal., 375 at 380.

"The question then recurs, Did the board of supervisors, acting for the county, apply this land to a public use? Hospital buildings are public buildings. (Pol. Code, Sec. 4046, Sub. 9.) If a public building be erected upon land belonging to the county by the proper authorities and it be devoted to the uses necessary to the character of the building and the purpose for which it was erected, it would seem as if the land was dedicated or put to a public use. Court houses, jails, and hospitals are put upon the same footing by the statute, supra, are called 'public buildings' and they are such to all intents and purposes. It will not do to say that the land on which they stand, or which is appurtenant and necessary thereto, is not dedicated to a public use. To hold otherwise would be to leave county jails, hospitals, court houses, and other public buildings, and the ground on which they stand, at the mercy of careless or corrupt county officials, and rapacious trespassers in collusion, perhaps, with such officers. This is contrary to public policy."

San Francisco v. Straut, 84 Cal., 124;

Ames v. City of San Diego, 101 Cal., 390.

Under leading California statutes we find the legislature putting this principle into statutory form.

Reclamation District Law.

Political Code, Section 3454, Subdivision 10, authorizes the trustees of a reclamation district:

> "To sell, convey, transfer, lease to others or otherwise dispose of such real or personal property belonging to the said district which said board of trustees *shall find no longer necessary* for the construction, maintenance or operation of the works of reclamation of said district."

Irrigation District Law.

The California Irrigation District Act provides in Section 29, Statutes 1919, page 1075:

> "The board of directors may determine by resolution duly entered upon their minutes that any property, real or personal, held by such irrigation district *is no longer necessary* to be retained for the uses and purposes thereof, and may thereafter sell such property."

Sacramento and San Joaquin Drainage District Law.

This act was passed in 1911 (Statutes of 1911, Extra Session, page 117). It has been amended from time to time in different particulars. The original act, in Sections 4 and 12, provided for the acquisition of property, but it nowhere provided for sale or transfer. So in 1921 the legislature enacted a special statute (Statutes of 1921, page 1493) which reads:

> "In case it should be determined by the reclamation board that any land heretofore or hereafter acquired by the Sacramento and San Joaquin drainage district and deeded to the State of California, for any right of way for river improvement work or flood control, *is in excess of what is or will be required therefor,* the board of control upon request of the said reclamation board is hereby authorized to negotiate the sale thereof

at a purchase price determined upon by said reclamation board, and the chairman of said board of control is hereby empowered when so authorized by said reclamation board to execute and deliver in the name and on behalf of the State of California, a conveyance of such land to the purchaser upon payment of such purchase price to the state treasurer."

The reclamation board is the governing body of the district.

County Government Law.

The general powers of the boards of supervisors of our counties are found in Section 4041 of our Political Code. Subdivision 9 of that section enumerates, among other powers, the following:

"To sell at public auction, at the court house door or at such other place within the county as the board may, by four-fifths vote, order, after five days' notice, given either by publication in a newspaper published in the county or by posting in three public places in the county, and convey to the highest bidder for cash any property belonging to the county *not required for public use,* paying the proceeds into the county treasury for the use of the county."

(b) The Entire Dam, Reservoir, Diversion Works and Conduit of the District's Mokelumne River Project Are Necessary for the Purposes and Uses of the District.

This must be true from the very fact that the district is acquiring them. And otherwise the district would not be authorized to acquire them.

(c) Mokelumne River Project of the Defendant District, as Proposed by Its Engineer, Adopted by Its Board of Directors, Approved by Its Voters, and Included in the Atkinson Contract, is Incapable of Use unless the Entire Dam and a Portion of the Reservoir and a Part of the Diversion Works Are Located Upon Lands of the United States Within the Jurisdiction of the Federal Power Commission.

We have so alleged and it is therefore admitted by the motion to dismiss. (See Trans. page 36, par. IX.)

(d) A License From the Federal Power Commission to the Defendant District Will Constitute a Contract Between Them.

There have been few decisions upon the Federal Water Power Act. But one decision has held that the license is a contract between the United States and the licensee.

Alameda Power Co. v. Gulf Power Co., 283 Fed. 606, at 615.

The language of the Court, referring to Section 6 of the act, is:

> "Thus the matter of license to construct the dam becomes in its nature the contract between the licensee and the government for making the improvement and when accepted the licensee is bound to comply with its conditions or submit to forfeiture of license."

This conclusion is inescapable under Section 6, which reads as follows:

> "Section 6. That licenses under this act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned *upon acceptance by the licensee of all the terms and conditions of this act and such further conditions, if any, as the commission shall prescribe in conformity with this act,* which said terms and conditions and the acceptance thereof shall be expressed in

said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this act, and may be altered or surrendered *only upon mutual agreement between the licensee and the commission* after ninety days' public notice."

(e) The Terms of Any License From the Federal Power Commission to the Defendant District Will and Must Provide for a Sale and Other Disposition, and for a Forfeiture and Loss of Property and Funds of the District Which Are Necessary for its Purposes and Uses.

Even a very hasty reading of certain sections of the Federal Water Power Act will confirm this proposition. We quote the pertinent sections:

Section 3. " 'Project' means complete unit of improvement or development, *consisting of a power house, all water conduits, all dams and appurtenant works and structures* (including navigation structures) which are a part of said unit, and *all storage, diverting, or forebay reservoirs* directly connected therewith, the *primary line or lines transmitting power therefrom to the point of junction with the distribution system* or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and *all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.*"

Section 13. "In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or, as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but

not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, *shall institute proceedings in equity in the District Court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed,* and such other equitable relief as the case may demand, as provided for in Section 26 hereof."

Section 14. *"That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in Section 3 hereof, and covered in whole or in part by the license,* or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission."

Section 15. "That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in Section 14 hereof, *the commission is authorized to issue a new license to the original licensee upon*

such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in Section 14 hereof."

Section 16. "That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee."

Section 26. "That the Attorney General may, on request of the commission or of the Secretary of War, *institute proceedings in equity in the Dis-*

trict Court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this act or of any lawful regulation or order promulgated hereunder. * * * *In the event a decree revoking a license is entered, the Court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same,* and to make and enforce such further orders and decrees as equity and justice may require. *At such sale or sales the vendee shall take the rights and privileges belonging to the licensee* and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of Section 14 hereof at the termination of the license."

A summary of the main points in these parts of the statutes is as follows:

(a) The "project" or "project works" would at least include the dam, the reservoir, including lands (nearly 1800 acres) to be acquired from private landowners, the power house and some portion of the power-transmission line; and may be part of the water-conduit, too, if that could be disconnected and utilized to produce power; and also all water rights.

(b) The license, *in any event,* terminates at the end of fifty years.

(c) The license may be lost (or forfeited) at any time for a number of different causes.

(d) When, *for any cause or in any way,* the license ends the Federal Government may take the "project" for its own use or it may grant the project to another licensee or the project may be sold at public sale to someone who then will become the licensee, though in any event the district would be compensated in some fashion and in some amount; or another license may issue to the licensee.

(e) The Federal Government may take possession and use the "project" for war purposes, though proper compensation must be rendered.

(f) The Construction of the Dam and Diversion Works on Lands of the United States, Even Though Not Done Under Any License From the Federal Power Commission, Will Entail a Disposition, Forfeiture and Loss of Property and Funds of the District Which Are Necessary for Its Purposes and Uses.

The dam and power house will be constructed wholly upon property of the United States. The immediate diversion works will also be built upon that same property. If the structures which the district proposes to build are not built under contract with the United States plainly the district will be a trespasser. And authorities are not needed here to prove that the owner of land becomes the exclusive owner of all structures of this kind which a trespasser builds thereon—especially where the owner is a government.

(g) What the District Proposes to Do, by and Through Its Contract With Atkinson and Under Its License From the Federal Power Commission, Will Be a Violation of Its Organic Act in Disbursing the Funds of the District and Also Will be a Waste of the District's Funds.

This conclusion follows from what has preceded, by the course of irresistible logic. For if the district, by the terms of its organic act, cannot lawfully dispose of property which is necessary for its purpose as defined by that act, and if, by license—contract or otherwise, such property in the very creation of it (so to speak) will be unlawfully disposed of, then the use of the funds of the district to build such property must necessarily be a violation of the statute and a waste of the district's funds.

(h) Any License From the Federal Power Commission to the District Will Be Invalid Because of the Inability of the Commission to Issue a License Upon the Only Terms Which the District May Lawfully Accept and Because of the Inability of the District to Take a License Upon the Only Terms Which the Commission May Lawfully Grant.

If, so far, our reasoning has been without material flaw this proposition is likewise an irresistible conclusion.

But if we are correct in this final proposition, then several important questions arise:

(a) If the district, through its defendant officials and contrary to the authority of its organic act and contrary to the law of California, does take a permit or license from the Federal Power Commission under such terms and conditions, will that permit or license be void or valid under the Federal Water Power Act?

(b) If the permit or license is void and the district constructs its project what will be the legal status of the dam and reservoir—who will own them, the United States or the District?

(c) Or, under such circumstances, will the license be partly valid and partly void—say valid so far as it will give the district the right to occupy the Federal land but void so far as it will subject the dam, reservoir, tunnel and possibly part of the aqueduct to loss by the district in the several ways specified in the Federal Water Power Act?

(d) If, because the permit or license is void, the United States will technically become the owner of the dam, reservoir, tunnel and part of the aqueduct, yet may it be that in some way the United States will be charged with a trust thereon on behalf of the district or on behalf of the State of California through its creature the district?

(e) If, under such circumstances, the permit or license is void but the Federal officials (the Federal Power Commission) let the district into occupation and the district builds its project will some other sort of license arise between the United States and the district? And will such other license be revocable or irrevocable and what otherwise will be its terms and what will be the ownership of dam, reservoir, tunnel and aqueduct?

(f) If the permit or license is void but the district constructs the project, will any ownership or interest of the United States extend to any portion of the project outside the land owned by the United States?

(g) If the permit or license is void but the district takes it and constructs the project, will the district, its officials and taxpayers become estopped to deny the validity of such permit or license?

(h) If the permit or license is void but the United States issues it and allows the district to enter under it and to construct and operate the project will the United States be estopped to deny the validity of such permit or license?

Upon the answers to these questions will depend any decision that the district will or will not violate its organic act in constructing this project.

But also, as we shall later show, *these very questions demonstrate that the matter in controversy does arise under the laws of the United States.*

In the lower Court the defendants did not gainsay that the law in California is as we have tried to expound it through so many previous pages. Rather they attempted to evade its application to this case by a number of arguments.

First, they said, this law applies to acts which would be in violation of and a repudiation of a public trust, but the contract with the Federal Government will be in aid of and consistent with the public responsibilities of the officers of the district, in aid of the general enterprise. This is a plausible but a bad argument. It is an attempt to cloak evil with a show of good. It is putting sheep's clothing upon a wolf. For doubtless in every case where the Courts declared the attempted sale of public property void because the property was impressed with a public trust the public

authorities justified and defended their act by claiming it to be to the financial welfare and advantage of the city. Perhaps, too, as strict matter of business, they were right. But the Courts did not let that fact interfere with or direct the decision. The fact that a city can operate a municipal waterworks only at a heavy loss does not authorize its trustees to repudiate the public trust by a sale of the works into private operation; for *the point is that the property is impressed with a public trust, that the property is in active service of the public, that the public relies upon the continuance of that service, that the public welfare demands the continuance of that service, that such interests and necessities of the public shall not be subjected to injury through any removal of the property from such public service and trust; and that such public service and trust must continue in connection with the property until something else has been provided which will take its place and make it useless.* When we apply this clear principle to our case it is but begging the question to say that what this district proposes to do is in aid of and not in repudiation of the public trust. For what do the directors of the district propose to do? Why, they propose to create a property to serve the public of the district with water and thereby to create a property which will be impressed with a public trust, while, on the other hand, they propose to subject that property by contract to possible dispositions hostile to the continuance of that property in the service of the public of the district and in the fulfillment of the public trust. *Thereby the proposed contract, on the principle which we invoke,*

is not in aid of the enterprise as a permanent trust-impressed project for the benefit of the people of the district but is hostile to such enterprise. Let us compare this proposed contract with the Federal Government with a proposed lease; for they are very similar. We do not doubt that the district may take a lease of property. To lease property is simply to acquire the right to use it. But a grant of power to lease property from another does not necessarily include with it the further power to take a lease which contains a provision that the lessee shall construct a large building on the property and that on a forfeiture or other termination of the lease the building shall revert to the landlord. A grant of power *to a private business corporation* to lease property might very well be held to be broad enough to include the power to lease on such terms, and yet a grant of power to a *public or municipal corporation* to lease the same property might very well be held to be *not* broad enough to include the power to lease on such terms. *The difference is that a public question enters into one situation but not into the other.* Two examples will illustrate the difference; as:

(a) A lease by a private corporation of a block of land for a period of fifty (50) years under an agreement to erect a large office building thereon which shall be the property of the landlord at the end of the term.

(b) A lease by a city of the same block of land for a period of fifty years under an agreement to erect a city hall and other public buildings thereon which

shall be the property of the landlord at the end of the term—say, for example, the present City Hall of San Francisco or the present City Hall of Oakland; for if legal at all it would be as legal for such structures as for any others. *In their respective fields* the City Hall of Oakland is related to the City of Oakland, and the dam, reservoir, et cetera, at Lancha Plana are related to the cities within the district in exactly the same way.

The public question which makes the distinction is fully stated in the various authorities from which we have quoted lengthily in preceding pages. It is put in these words in the note to the recent Oklahoma case (39 A. L. R. 217):

> "In this country, however, it is generally held that a municipal corporation has no implied power to sell property *which is devoted to public use;* and such property, even if the title is in the municipality, *is held in trust for the people of the state as a whole,* and cannot be alienated except by the express consent of the legislature or upon the discontinuance of the public use in the manner provided by law."

And the Oklahoma Supreme Court, at page 212 (39 A. L. R.) puts the difference neatly in this way:

> "There is a clear distinction, recognized by practically all authorities, between property purchased and held by municipal corporations for the use of the corporation as an entity, *and that purchased and held by such corporation for the public use and benefit of its citizens.* In other words, its title to and power of disposition of property acquired for strictly corporate uses and purposes *are different from its title to and power of disposition of property acquired for and actually*

dedicated to the public use of its inhabitants. As to the former class the power of the corporation to dispose of it is unquestioned. The rule is different as to the latter class. *It is only when the public use has been abandoned, or the property has become unsuitable or inadequate for the purpose to which it was dedicated, that a power of disposition is recognized in the corporation."*

There are many other authorities on the question of the power of a municipal corporation to dispose of properties which are charged with a public use. A few important ones are:

Wright v. Walcott, (Mass.) 18 A. L. R. 1242;

Davis v. Rockport, (Mass.) 43 L. R. A. (M. S.) 1139;

Douglass v. Montgomery, (Ala.) 43 L. R. A. 376.

Note: This case further supports plaintiff's right to bring this suit to enforce the right of the district against misapplication of its funds and property.

Augusta v. Burum, (Ga.) 26 L. R. A. 340.

Nor must we forget another thing—namely, that under the Federal Water Power Act the "project", *which by the terms of the act and the license under it are subject to the authority of the Federal Government,* includes some 1800 acres of lands *which the district must acquire from private landowners* and also such transmission lines and aqueducts *beyond the government's land* as will be necessary to enable the Federal Government to operate the "project" in case the government shall take it over in any way provided by the act and license. *The necessary effect*

of the act and license is that these structures and lands, like the structures built directly upon the Federal lands, become the property of the United States and all that the district will have will be a possible contractual right to use the structures and lands for a limited period and to be paid for them when that use ceases. The district cannot sell these reservoir lands, transmission lines and aqueducts; neither can it contract them away by taking a license under the Federal Water Power Act.

Second, the defendants said to the Court below that, the Federal Government could not take the dam and reservoir without compensation. But what of it? The fact that the city authorities proposed to get full value on a sale of property impressed with a public trust has never prevented an application of the principle that such property could not be sold under a general power of sale. And the full value of the property, though paid into the city's coffers, does not provide the public with the service of which it has been deprived through the sale of the trust-burdened property.

Third, the defendants said that the government must give reasonable notice of an intention to take over the property; the district, if it observes the license, will be entitled to have the enjoyment of the property for fifty years, and probably the Federal Government will never take the project away from the district. These are matters of speculation and, as such, interesting. But we are dealing with a firm principle which has so been made firm out of an abundance of reason and from an abundance of ex-

perience. The principle is not to be whittled to nothing, or nearly so, by such process of shaving it "by degrees", by trying to ascertain whether or not the evil possibilities are near or remote, in the judgment of the Court. The structures will be built upon Federal land. They will become part of the land—as much so as the natural-rock foundation. The title to them will then be in the owner of the land. The United States continues as such owner. All that the district will have will be a possible contractual right to use the structures for a limited period and to be paid for them when that use ceases. *Moreover, by the very terms of the Federal Water Power Act and the license under it the "project" which comes under such control of the Federal Government includes the entire reservoir—some 1800 acres of land which must be acquired by the district—and other structures, such as necessary transmission lines, which will not be upon the government property. The effect of the license is immediate—that the title to all these lands and structures goes to the Federal Government at once to feed the terms of the license and the Federal Water Power Act.* Neither the Courts nor the district can control the future, for the future will be in the hands of the United States Government; and the exigencies which may arise cannot be guessed, much less foretold. The fact remains that title to millions of dollars of property, created and acquired by the district, passes at once by the license to the Federal Government, that such property in its creation and acquirement is impressed with a public trust for a public service to the people in the district, and that under the law such

disposition of the property may not be made, even though a long term of use is reserved.

Otherwise what could not be done directly could be done indirectly—by transferring title for a valuable consideration with a reservation of a long term of use on conditions and by forfeiting thereafter the right to such use by not observing the conditions. Surely the Courts will not weaken the principle by sanctioning such an arrangement or by making it possible. And, finally, such a deal with a private concern would be fully as justifiable as it would be with the Federal Government. *The applicability of the principle cannot turn on the character of the party with whom the deal is made.*

Fourth, the defendants further said: "Other public agencies have similar rights from the Federal Government. Witness the licenses of the City and County of San Francisco for its Hetch Hetchy Project and the City of Los Angeles for its Owens River Development. The conditions of forfeiture contained in these grants have not prevented the development of a necessary water supply for these communities." The charters of Los Angeles and of San Francisco are not before this Court for construction. But if we are right in the law then the fact that a decision according to law will affect Los Angeles and San Francisco is not of any consequence here. If those two cities have violated their charters they must take the consequences. We take it that the Courts will not render wrong decisions merely to support what Los Angeles and San Francisco have done, especially where the Courts are asked *to assume* in arriving at their decisions

that Los Angeles and San Francisco have violated their charters in the respect under challenge. Otherwise what chance has the ordinary citizen to confine such public agencies within the limits of their fundamental authority?

Fifth, the defendants also said: "The public service corporations distributing the power are liable to forfeit their licenses for a disregard of the terms thereof. It has been held that even private public service corporations cannot dispose of their property in such a way as to impair the performance of their public trust;" And yet, said defendants, it is clear that such public service corporations can legally take such licenses from the Federal Power Commission. *In the first place* we challenge this conclusion. Let us assume two states of fact—(a) a public service corporation which serves a community with a supply of water to the exclusion of all other supplies and which proposes to take a license whereby under several different contingencies and finally at the end of a definite period of years that water system may be taken away from the company by the Federal Government and devoted to the use of some other community. (b) A public service corporation which, serving a community with a supply of water to the exclusion of all other supplies, proposes to abandon and destroy that supply and to take such license from the Federal Government. We do not hesitate to contend, under the very principle advanced by the defendants, that such public service corporation would not be allowed to enter into such an arrangement—because "even private public service corporations cannot dispose of

their property in such a way as to impair the performance of their public trust." *In the second place* we are dealing in our case with an *actual want of statutory authority in the district to dispose of its property*—whereas private public service corporations, since they are organized with broad powers, always have as full power to dispose of property as they have to acquire it. In other words, we have in our case two reasons why the district may not take this license:

(1) It lacks the statutory power to dispose of its property under the terms of the license; and

(2) Such disposition violates the public trust for which it proposes to acquire the reservoir site, build the dam, etc. The cases which deal with private public service corporations consider only the second reason and there is much more room for discretion in action under the second than under the first reason.

VIII.

SECOND QUESTION.

IS THE COMPLAINANT A PROPER PARTY IN INTEREST?

Any discussion of this question begins with these propositions of law and fact:

(a) The directors of the district, in constructing this project, will waste the funds and property of the district. (Provided that our exposition of the law on the first question has been correct.)

(b) Complainant is a taxpayer within and to the district (Trans. page 31, Par. II and page 33, Par. VI) and is necessarily interested in a financial way

to see that the funds and property of the district are not wasted.

(c) The directors of the district have let a contract to Lynn S. Atkinson, for the contract price of $3,081,378, to build the Lancha Plana Dam, and outlets through the dam, including gates and power house (Trans. page 42) entirely, and necessarily, upon lands of the United States. (Trans. page 36, Par. IX.)

(d) If the directors, acting on behalf of the district, are permitted to take a license from the Federal Power Commission and to proceed with the project they will do so and will have Atkinson go ahead with his contract and will pay him as the contract requires. (Trans. page 49, Par. XXIV.) (See also pages 34, 46 and 47.)

(e) The district is in control of its directors; demand upon them that they decline to proceed with the project is useless; and therefore tax-payers alone, by proceedings in Court, can stop the threatened waste of the district's funds and properties.

That tax-payers may do so is amply settled. Their right to do so and the circumstances under which they may act are expounded by the following authorities:

The best short statement of the California law that we have seen is this from *Crowe v. Boyle,* 184 Cal. 117 at 152:

> "In this state we have been very liberal in the application of a rule permitting taxpayers to bring a suit to prevent the illegal conduct of city

officials, *and no showing of special damage to the particular taxpayer has been held necessary.*"

In *Santa Rosa Lighting Co. v. Woodward,* 119 Cal. 30, at 34, the Court said:

> "Besides, as a taxpayer plaintiff was beneficially interested, *and I do not think it essential, upon an application in a proper case designed to compel compliance with statute law, that the party must show actual pecuniary damage.* It should be presumed that where the law enjoins a duty upon a municipal body and specifically points out the mode of its performance, that a violation of that duty and a disregard of the mode of its performance will work injury."

In an earlier case (*Barry v. Goad,* 89 Cal. 215, at 223) the same rule occurs:

> "The objection that the plaintiff cannot maintain the action *for the reason that he does not show that he will sustain any special injury different from that of the public at large is untenable.*"

Moreover, the rule has been applied in California where no direct or special damage could possibly be shown. The following three cases are of that sort:

Yarnell v. City of Los Angeles, 87 Cal. 603.

A taxpayer brought this action against the defendants to prevent the city treasurer from depositing the public moneys of the city with a local bank pursuant to a contract between the city and the bank. We quote from page 610:

> "The point is hinted at, though not pressed in the briefs, that a taxpayer cannot maintain this action. We suppose that counsel wish the case decided on its merits, and not upon an issue

> in the nature of one raised by a dilatory plea; for their arguments go almost entirely to the point of the constitutionality and validity of the part of the charter assailed. We think, however, that in this case where it is proposed to take all the public moneys of the municipality out of the hands of their legal custodian, and place them in the possession and control of a private corporation, a taxpayer has sufficient interest in the subject matter to prevent, by suit, the consummation of the illegal act."
>
> *Clouse v. City of San Diego,* 159 Cal. 434.

The defendant city had sold bonds to get funds to build certain roads. The board of city trustees adopted an ordinance which authorized the board of public works to purchase materials and do the work by the day. The action was brought by plaintiffs as taxpayers to restrain the city's officials from proceeding in this manner or in any other manner than by letting contracts after advertisements for bids. The defendants claimed that their demurrer to the complaint should have been sustained "because of failure to disclose plaintiffs' right of action, *in that the sort of injury which plaintiffs, as citizens, would suffer, is not therein described".* But our Supreme Court replied:

> "We think it is sufficient answer to this contention that a method of paying for work in a manner not prescribed by law might be expensive and wasteful, and that contractors capable of giving the best service might be precluded from participating in the effort to secure contracts to do the work. This would give plaintiffs, as citizens, sufficient standing to maintain this action."
>
> *Gibson v. Board of Supervisors,* 80 Cal. 359.

One quotation from page 366 is enough:

"Counsel for appellant states—although he does not argue—the point that plaintiff in his capacity of taxpayer has no right to institute the action.

It is clearly the law that if the action of the board had been the other way, that is, if they had declared the proposition to issue the bonds carried when in fact it had not been, plaintiff could have maintained the action. *(Schumacker v. Toberman,* 56 Cal. 508; *Andrews v. Pratt,* 44 Cal. 309; *Maxwell v. Supervisors,* 53 Cal. 389; *Foster v. Coleman,* 10 Cal. 278.) That is, a taxpayer can, beyond doubt, restrain any illegal action which would increase the burden of taxation. It is not so clear, however, when he can compel affirmative action, although it was held in *Hyatt v. Allen,* 54 Cal. 353, that he can by mandamus compel an assessor to assess property subject to assessment. It is not necessary here to determine whether or not plaintiff would be entitled to maintain mandamus against the board of supervisors to compel them to issue the bonds. We think, however, that, as a property owner and taxpayer, he is sufficiently a party interested to prevent an untrue, public, official declaration of the result of an election on a proposition to issue bonds and to have the true declaration made, whether the real result of the election be for or against the issuance of such bonds. *No other proper party plaintiff to such an action has been suggested."*

Short quotations from two other cases are apropos:

Winn v. Shaw, 87 Cal. 631 at 636.

"We are of opinion that a taxpayer of a county has such an interest in the proper application of funds belonging to the county that he may maintain an action to prevent their withdrawal from the treasury in payment or satisfaction of demands which have no validity against the county."

Biggart v. Lewis, 183 Cal. 660 at 664.

"It is conceded at the outset, as indeed it must be, that the plaintiff, as a taxpayer of and resident within the district, has the legal right to invoke the remedy of injunction to restrain the expenditure of the funds of the district if it can be said that such expenditure finds no sanction in the law."

What, now, is the principle at the bottom of these cases? It is this—that the city or the county is in the control and under the domination of its officers, that where in the exercise of such control and domination the officers are pursuing illegal methods or are making unlawful expenditures such officers naturally will not afford protection against themselves, *that, in consequence, the only one who can assert the right of the city or county to be protected against the wrongful acts of its officers is some one of the general body of citizens, and that, to insure against mere intermeddling, that someone will be required to be a taxpayer.*

IX.

THIRD QUESTION.

DOES THE MATTER IN CONTROVERSY EXCEED THE SUM OF $3000?

Naturally the answer to this question depends upon what the matter in controversy is.

The district's contention is that the taxpayer sued, in these cases, to protect only his own individual interest and that the measure of that interest is the amount of taxes which the taxpayer probably will

have to contribute towards full payment for that part of the project which will be wasted. In other words, this contention is that the taxpayer sued *on his own behalf to protect his own interest and right* and not otherwise.

If the district's contention is sound, then we readily confess that the amount in controversy does not exceed $3000.

But appellant contends, to the contrary, that the taxpayer since he has a pecuniary interest, is allowed to bring suit because the legally constituted protectors of the district, its directors and officials, as the persons in control of its affairs, are refusing to protect it and, in fact, are actively promoting the wastage of its funds and properties; and *that, in consequence, the right which the taxpayer is enforcing is not his own personal right that he shall not be taxed to provide funds for unlawful uses but is the right of the district that its funds shall not be expended in unlawful purposes and shall not be wasted.*

If we are correct in our position, then the amount in controversy is the amount of the district's funds which will be wasted on the Lancha Plana works under the Atkinson contract, namely $3,081,378.

That such is the right which the taxpayer is enforcing appears very clearly, as we see it, from the cases which we have quoted and cited in Division VIII above in showing that appellant is a proper party to bring this suit.

But there are yet stronger authorities that the right which the taxpayer is asserting is the right of the district and not his own mere personal right.

So has it been held in California. The case is *Osburn v. Stone,* 170 Cal. 480. We quote from pages 482 and 483:

> "A general demurrer was sustained to plaintiff's complaint and from the judgment which followed it, dismissing the action, plaintiff appeals. *The complaint charged that the defendants while acting, one as mayor, the other as member of the council, of the City of Santa Cruz, made certain illegal expenditures for and on account of which plaintiff seeks a judgment against them, compelling them to pay into the city treasury for the benefit of the taxpayers and property owners of the city the sum of $37,163.*
>
> So far as the character of this action is concerned, by the great weight of authority a taxpayer may maintain it. The provision of Section 526a of the Code of Civil Procedure, authorizing a taxpayer to maintain an action to restrain an illegal expenditure, does not in letter or in spirit forbid a taxpayer from seeking to recover on behalf of his municipality the same moneys if illegally expended. Tacitly, this right of action has been recognized in this state in *Mock v. Santa Rosa,* 126 Cal. 331, (58 Pac. 826). That the right to prosecute such an action is abundantly supported may be seen by reference to *Cathers v. Moores,* 78 Neb. 17, (14 L. R. A. (N. S.) 302, 113 N. W. 119); *Zuelly v. Casper,* 160 Ind. 455, (63 L. R. A. 133, 67 N. E. 103); *Russell v. Tate,* 52 Ark. 541, (20 Am. St. Rep. 193, 7 L. R. A. 180, 13 S. W. 130); *Independent School Dist. v. Collins,* 15 Idaho 535, (128 Am. St. Rep. 76, 98 Pac. 857); 2 *Smith on Municipal Corporations,* Sec. 1645; 4 *Dillon on Municpal Corporations,* Sec. 1588. The contrary view obtains in Oregon and in West Virgina. (*Brownfield v. Houser,* 30 Or. 534, (49 Pac. 843); *Sears v. James,* 47 Or. 50, 55, (82 Pac. 14); *Bryant v. Logan,* 56 W. Va. 141, (3 Ann. Cas. 1011, 49 S. E. 21).) These courts reason that it would subject the officers of municipalities to

> intolerable and interminable litigation if the right of a taxpayer to prosecute such an action were recognized. *Yet to us it seems quite plain that the necessity to a municipality, whose affairs are in the hands of hostile trustees or councilmen, to recover for illegal expenditures, through the medium of such an action, is quite as great and as imperative as it is in the case of private corporations, and as a stockholder of the latter would have on behalf of his corporation, upon the refusal of its directors to act, the right to maintain such an action, so we think should a taxpayer in the case of a municipality be accorded the same right and power.*"

Please note that the Court put the matter *on the basis of an analogy to an action by a stockholder "on behalf of his corporation"*. And when we turn to the law in California on the latter subject we quickly discover that the Supreme Court holds that in such case the stockholder is enforcing, *not his own right, but right of the corporation.* We refer particularly to *Turner v. Markham,* 155 Cal. 562, at pages 569 and 570:

> "At the threshold of this inquiry, however, it is proper to pause to point out what is the exact nature of the action before us. In its essence, it is an action brought by the corporation itself to recover redress for some legal wrong which the corporation itself has suffered. *To prevent a failure of justice, as where the governing board of directors or trustees of the corporation refuses to prosecute such an action, the law permits a stockholder to begin and maintain it on behalf of the corporation.* But the fact that a stockholder is the nominal plaintiff in such an action, whether he prosecutes it as an individual stockholder or as a representative of a class of disaffected stockholders, does not in any manner, or to the slightest

extent, enlarge the rights and remedies of the action. *This action must still be founded upon some wrong which the corporation, as a corporation, has suffered, and for which, if itself were plaintiff, it could secure legal or equitable redress.* Therefore, if the evidence shall establish that the corporation itself has suffered no wrong, cognizable either at law or in equity, it will matter not how just and how grievous may be the complaint of the individual stockholder, nor how complete may be the proof of his personal loss, damage, or injury. In this action on behalf of the corporation no recovery may be had, and the stockholder will be compelled to proceed by his individual action to obtain a personal recovery. (3 Pomeroy's Equity Jurisprudence, 3d ed., pp. 2123 et seq.; Cook on Stock and Stockholders, sec. 692; Davenport v. Dows, 18 Wall. 626; In re Ambrose etc., L. R. 14, Ch. Div. (Eng.) 390; Langdon v. Fogg, 18 Fed. 5; Stewart v. St. Louis R. R. Co., 41 Fed. 736; Foster v. Seymour, 23 Fed. 65)."

It might be well to note, too, that the same judge wrote the two opinions in *Turner v. Markham* and *Osburn v. Stone.*

Our point is further emphasized in *Osburn v. Stone,* at page 483, where the Court said:

> "The general rule is that the municipality itself, *upon the refusal of its officers to maintain the action,* should be impleaded as a party defendant, but of course it is fundamental that *where a demand would be* unavailing, as is shown to be the case under the present complaint, *a demand upon the municipal authorities so to commence proceedings is unnecessary.*"

But if the taxpayer were enforcing his own right for his own protection rather than the right of the

municipality for its protection such language would be both pointless and witless.

We have found nowhere any finer statement on this subject than what Professor Pomeroy says in Section 1095, Vol. III, Fourth Edition, of his work on Equity Jurisprudence. We will quote what he says; and the italics are his and not ours:

> "While, in general, actions to obtain relief against wrongful dealings with the corporate property by directors and officers must be brought by and in the name of the corporation, yet if in any such case the corporation should refuse to bring a suit the courts have seen that the stockholders would be without any immediate and certain remedy, unless a modification of the general rule were admitted. To that end the following modification of the general rule stated in the last preceding paragraph has been established as firmly and surely as the rule itself. Wherever a cause of action exists primarily in behalf of the corporation against directors, officers and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation either *actually or virtually refuses* to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors, officers and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party—usually as a co-defendant. The *rationale* of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his,* or because *he* is entitled to the relief sought; he is permitted

to sue in this manner *simply in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit, or may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder-plaintiff. The corporation is, therefore, an indispensably *necessary* party, not simply on the general principles of equity pleading in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy nor in the relief. In fact, the plaintiff has no such direct interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice."

In the lower Court the district cited against us a number of Federal cases. To complete our discussion we will consider them here.

The district relied very strongly upon *Colvin v. Jacksonville,* 158 U. S. 456. We, in reply, relied upon *Brown v. Trousdale,* 138 U. S. 389. The difference between these two cases is just the difference between the case where the complainant is seeking to enforce or protect his own right and the other case where the complainant is seeking to enforce or protect the right of the corporation, either public or private. The Supreme Court of the United States reconciled these

two cases upon the basis of that very distinction. In *Colvin v. Jacksonville* the Court rested its decision upon the prior case of *El Paso Water Company v. El Paso,* 152 U. S. 157. The Court said of that earlier case: *"The case is in point and is decisive";* and quoted from it as the point of decision the following:

> "The bill is filed by the plaintiff to protect *its individual interest and to prevent damage to itself.* It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result *in its damage* to an amount in excess of $5,000."

Moreover the Court, *on this very ground,* specifically distinguished the early case of *Brown v. Trousdale,* 138 U. S. 389, saying:

> "There several hundred taxpayers of a county in Kentucky, for themselves and others associated with them, numbering about twelve hundred, and for and on behalf of all other taxpayers in the county and *for the benefit likewise of said county* filed their bill of complaint against the county authorities and certain funding officers."

Chief Justice Fuller wrote the decision of the Court in both cases. He said of *Brown v. Trousdale* with reference to *Colvin v. Jacksonville* that the former *"is not to the contrary"* of the latter and then quoted his opinion in the former case as follows:

> "The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally

injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a single and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, *that order was but preliminary, and was not the main purpose of the bill,* but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

Therefore, *Colvin v. Jacksonville* is not against us and *Brown v. Trousdale* completely substantiates our position.

Defendant's next case *(Wheless v. St. Louis),* 180 U. S. 379, is plainly a case where *the plaintiff sought to enforce or protect his own individual right.* He attempted to restrain the levy of a street assessment upon his lot by the defendant city—a thing very far from a suit to protect the funds or property of the city from a wrongful use by the city's officials who controlled the city and so kept it from protecting itself. Chief Justice Fuller again wrote the Court's opinion. Neither *Colvin v. Jacksonville* nor *Brown v. Trousdale* is noticed. The Court rightly held that in such case the matter in dispute was "the pecuniary consequence to the individual party."

Defendants' third case is *Walter v. Northeastern Railroad Co.,* 147 U. S. 370. This was a suit against county officials of several counties in South Carolina

to enjoin the collection of certain taxes upon the ground that such taxes were unconstitutional and void. Obviously this case is identical with *Wheless v. St. Louis.* It came before *Colvin v. Jacksonville;* and while it is after *Brown v. Trousdale* the latter case is not mentioned.

Defendants' next case is *Risley v. City of Utica,* 168 Fed. 737. But that was just another tax-case—a case where the complainant filed his bill to enjoin the levy of a tax by the defendant city. It did not involve a wrongful disposition of the property of the city, to its injury, by officials who controlled it and thereby prevented it from protecting itself.

Then comes *Cowell v. City Water Supply Co.,* 121 Fed. 53. It seems to us very clear that this case did not involve anything more *than the personal right of the plaintiff.* The Court stated the matter thus (page 54):

> "The complainant brings this suit on behalf of himself and on behalf of all others of the same class who may join in the proceeding, and his prayer is that the organization of the City Water Supply Company, the stock it has issued, and the mortgages it has made, may be declared void; that his undivided interest, which he avers to be 1/325 of the property held by the City Water Supply Company may be declared to be free from all liens and incumbrances except a lien for $51,000, evidenced by an old underlying mortgage made by the Ottumwa Waterworks Company before the mortgage which was foreclosed was executed, or that, in the event that the court should sustain the incorporation of the supply company, and the stock and mortgages it has made, the complainant may recover of the individuals constituting the committee a sum of money equal to 1/325

of $524,000 and 1/325 of $1,509.79, and 1/325 of the income and earnings of the property since it came into the hands of the committee on September 12, 1897.

It will be seen from this brief statement of the averments of the bill that the property of the City Water Supply Company was not worth, and is not claimed to be worth, more than $525,000, and that the complainant's alleged share of it was not of a value exceeding 1/325 of $525,000, or $1,615.38, while the amount of the judgment for money which he sought to recover in case the stock and the mortgages of the supply company were sustained did not exceed $1,650, and the debt he was endeavoring to collect was only $1,000 and interest."

Defendants also rely strongly upon *Scott v. Frazier,* 258 Fed. 669. But that case squarely held that the right which the plaintiffs were trying to protect *was their own right and not the right of the State of North Dakota.* For the Court said at page 671:

> *"They assert that the suit is brought on behalf of the state to protect it against the unconstitutional use of its funds, and an unconstitutional issue of bonds.* That being the nature of the suit, it is claimed that the entire fund is the amount in controversy, and not the right or possible damage of the plaintiffs. This theory presupposes that the state has rights that are protected by the Fourteenth Amendment. *If it has no such rights, plaintiffs have no standing in this court as its representatives and must stand on their own feet.* Has the state, then, any rights under the Fourteenth Amendment? That question must be answered in the negative. The amendment protects only the rights of 'persons'. This term has been enlarged by judicial interpretation so as to cover private corporations. It does not embrace public corporations, much less the state. Its language is:

> 'Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'
>
> It would be a perversion of language to say this language protects the state against acts of the state. It protects persons only, a term which embraces private corporation, but not public corporations or states. *It follows, therefore, that plaintiffs, while they assert rights under the Fourteenth Amendment, cannot assert rights of the state because it has no rights that are protected by that amendment. It necessarily results that plaintiffs in this suit represent only themselves.*"

Since this was true there could be no question of the correctness of the decision.

The defendant argued in the Court below, and may argue here, that what we say applies only to private corporations—that it does not apply to public corporations. This argument is useless in view of the above decisions. This very argument was offered in *Osburn v. Stone,* 170 Cal. 480, a case involving a municipality; and the Court specifically repudiates any such distinction, saying:

> "Yet to us it seems quite plain that the *necessity to a municipality,* whose affairs are in the hands of hostile trustees or councilmen, to recover for illegal expenditures, through the medium of such an action, is quite *as great and as imperative* as it is in the case of private corporations, and as a stockholder of the latter would have on behalf of his corporation, upon the refusal of its directors to act, the right to maintain such an action, *so we think* should a taxpayer in the case of a municipality be accorded the same right and power."

Moreover, in *Brown v. Trousdale,* 138 U. S. 389, where the right to maintain such an action was upheld, the action was brought to assert the right of a *county* in Kentucky. Finally the United States Supreme Court in *Massachusetts v. Mellon,* 262 U. S. 447, specifically drew the same analogy, as was drawn by the California Supreme Court, of a taxpayer in a municipality to a stockholder in a corporation by saying:

> "The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, *which is not without some resemblance to that subsisting between the stockholder and a private corporation.*"

Therefore, the matter here in controversy is far in excess of $3000.

Two recent Federal cases squarely decided this question in accordance with our foregoing contentions. The first is a case decided by the Circuit Court of Appeals for the Eighth Circuit. It is *Hutchinson Box Board and Paper Company v. Van Horn,* 299 Fed. 424. On page 425 the Court said:

> "This is an action in equity, brought by L. K. Van Horn, appellee, against the Hutchinson Box Board & Paper Company, hereinafter called the Box Board Company, the Hutchinson Egg Case Filler Company, hereinafter called the Egg Case Company, and Emerson Carey, appellants, to set aside and cancel a contract entered into between the two companies, and to recover the market price of certain straw board furnished the Egg Case Company by the Box Board Company under said contract. *Appellee is a stockholder in the*

Box Board Company and prosecutes this suit as a stockholder's suit after demand upon the Box Board Company and its officers to prosecute the same and their refusal."

And on page 428, the Court also said:

"Appellants first contend the trial court erred in overruling the motions to dismiss, and in not dismissing the suit after it found that the market value of appellee's stock was not equal to $3,000. They predicate their argument upon the proposition that the amount in controversy is to be determined from the actual value of the stock owned by appellee. In this appellants are in error. The controversy involves the validity of the contract, the amount due the Box Board Company for box board and other products furnished thereunder, the duty of the company to prosecute a suit to cancel the contract and for an accounting for the products furnished, and the right of the appellee to prosecute such suit as plaintiff because of the refusal of the company to prosecute same. *The right sought to be enforced belonged to the company, but upon its wrongful refusal to sue therefor the right to prosecute the suit inured to the appellee. The judgment had to be for the amount due the company and not merely the amount of appellee's incidental interest therein.* Davenport v. Dows, 85 U. S. 626, 21 L. Ed. 938. Clearly, then the amount in controversy is the value of the corporate right sought to be enforced and not the value of appellee's stock. Foster's Fed. Prac. (6th Ed.) vol. 1, par. 16; McKee et al. v. Chatauqua Assembly et al. (C. C.) 124 Fed. 808; Larabee v. Dolley, State Bank Commissioner, et al. (C. C.) 175 Fed. 365 (reversed on other grounds 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065)."

The second case is one decided by the District Court of New York for the Southern Division. It is

M'Atamney v. Commonwealth Hotel Const. Corp., 296 Fed. page 500. At pages 501 and 502, the Court said:

> "It appears that the moving party is a stockholder owning one share of stock in the Commonwealth Hotel Construction Company, one of the defendants herein. He began suit in the New York state court, on or about December 20, 1923, on behalf of himself as a stockholder and all other stockholders who choose to make themselves parties to the action, against the two defendants herein and other individual officers and directors of the Commonwealth Hotel Construction Corporation. *The action, in substance, is for malfeasance or misfaesance in office, and the corporations are joined as defendants apparently because the transfer of certain real estate from one of the defendant corporations to the other is challenged. The action is in the nature of an action for waste and to prevent diversion of corporate assets.*"

Again, on pages 503 and 504, the Court said:

> "The bill of complaint alleges a diversity of citizenship, and the plaintiff asserts a claim of $2,800 incurred by the defendant Commonwealth, and a claim of $2,500 incurred by the defendant Broadway. It further alleges that the assets and properties of the two defendants are commingled, and that only by a trial can it be adjudicated whether any apportionment of said claims, if established, should be apportioned partly to one and partly to the other defendant. In substance, it alleges facts which, if substantiated, would predicate a common liability for the total amount. The intervening creditors, as party plaintiffs, have, or some of them have, claims in excess of $3,000. The moving parties herein contend that these allegations do not show that $3,000 is the subject of the controversy, so that the court may assume jurisdiction. The court is of the opinion, as stated, that the aggregate amount of

plaintiff's claim against the defendants is in excess of $3,000, even if the intervening parties plaintiff were not considered. *But the plaintiff and the others intervening as plaintiffs seek to have all assets of the defendant corporations conserved for the benefit of all persons concerned. The subject matter of the action is not, therefore, merely the debt of the plaintiff, or of the intervening plaintiffs; it is the property of the defendant corporations, sought to be taken possession of and distributed on behalf of the plaintiff and all other creditors and parties in interest.*

The bill of complaint alleges, and it is not disputed, that the property and assets of the defendant corporations, which are the real subject matter of the suit, are worth 'many hundreds of thousands of dollars', and, in my judgment, in any event, these assets are the amount involved for the purpose of determining this jurisdictional question in an action of this nature."

Then there is the decision of the United States Supreme Court entitled *City of Davenport v. David Dows,* 18 Wall. 626, 21 Law. Ed. 938. In that case the Court said:

"That a stockholder may bring a suit when a corporation refuses is settled in *Dodge v. Woolsey,* 18 How. 340, 15 L. Ed. 404, *but such a suit can only be maintained on the ground that the rights of the corporation are involved.* These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. *The relief asked is on behalf of the corporation, not the individual shareholder;*

and if it be granted the complainant derives only an incidental benefit from it.''

X.

FOURTH QUESTION.

DOES THE MATTER IN CONTROVERSY ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES?

When we enter upon this question we must remember four things in particular:

(a) That Section 14 of the Federal Water Power Act says:

> "The United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects *as defined in Section 3 hereof, and covered in whole or in part by the license.''*

(b) That Section 3 of the act defines "project'' in these all-comprehensive words:

> " 'Project' means complete unit of improvement or development, consisting of a power house, *all water conduits,* all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and *all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system,* all miscellaneous structures used and useful in connection with said unit or any part thereof, *and all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such suit.''*

(c) That only a few hundred out of several thousand acres in the proposed Lancha Plana Reservoir are federal land and the rest are in private ownership and will be acquired by the district by purchase or condemnation.

(d) That to make use of the reservoir, the dam and power house the district will build pipe lines to convey water and transmission lines to transmit power and these water and power lines will be off the federal land but will be necessary for the use of the reservoir, dam and power house.

In the trial Court the defendants argued that the only question here is whether or not what the district proposes to do is in violation of the law of the State of California—a non-Federal question. But such view refuses to recognize a correct sequence and distinction in ideas. The proper sequence and distinction is

(a) The district proposes to acquire 1800 acres of land from private owners, to get from the United States a license to use 200 acres of adjoining Federal land, to construct a dam on the Federal land which will utilize the entire 2000 acres as a single reservoir for a single "project", to build a power-house as part of the dam, and to build transmission lines from the power-house and pipe lines from the reservoir as part of the same "project";

(b) the license, as issued under the Federal Water Power Act, must contain certain provisions; and those provisions involve the 1800 acres and transmission lines and pipe lines as well as the dam and power-house which will be erected on the Federal lands;

(c) by the law of the State of California the district has certain limitations upon its powers;

(d) query—is the effect of the Federal Water Power Act and of the license issued under it and of the future acts of the district in conforming thereto such that the district will exceed those limitations upon its powers? There is no dispute between us over propositions (a) and (b), but we seriously disagree on propositions (c) and (d). Proposition (c) is a question in state law; proposition (d) is a question in Federal law and the matter in controversy under it is a Federal question, as we expect to show. But what we here emphasize is that this case involves several questions, some of which are state questions and some of which are Federal questions; and under such circumstances the Federal Courts have jurisdiction.

Chicago Great Western R. Co. v. Kendall, 266 U. S. 94.

Here the contention of defendants must come to this —that a decision of the state question in plaintiff's favor is necessary in order that a Federal question can arise and that where such is the case, the Federal Courts cannot have jurisdictions. But the error in this conclusion is so plain that we will not waste words on it.

We assume then, that the state question has been decided in our favor. On that assumption what matter in controversy arises under the constitution or laws of the United States?

Here a surprising number of suggestions may be made, and, without attempting to be exhaustive, we offer the following:

(a) Will the effect of the license be to transfer title at once to the United States of the 1800 acres which the district must acquire from private landowners? If so, there will be an immediate wastage of funds of the district; but if not, will there be a wastage of funds?

(b) Or, will the effect of the license be to give to the United States merely a contract for title by which the United States or some other licensee than defendant district will get title when compensation has been paid to the district as required by the Federal Water Power Act? If so, will the effect of such contract really be a wastage of the funds of the district?

(c) Or, in view of the limitations upon the powers of the district and the principle of public policy involved can a license, as a contract between the district and the United States, have any such effect as is suggested in either (a) or (b) supra? And if not, will there be a wastage of funds of the district?

(d) Questions (a), (b) and (c) must be directed also to the power transmission lines and the pipe lines to the extent that they are off Federal lands and yet are reasonably necessary as part of the "project" for its successful operation and enjoyment.

(e) Will the license be valid or void if the district takes such license in excess of its powers? If the license will yet be valid there will be a wastage of funds of the district; but will there be such wastage if the license is void?

(f) May the Federal Power Commission make such modifications in the license that the district may take it and still comply with the California law?

(g) If the license is void but the district enters under it and erects structures on the Federal land—

1. Will the district be estopped to deny the validity of the license?

2. Will the United States be so estopped?

3. Will any estoppel of the district extend to the 1800 acres and to the transmission lines and pipe lines?

4. If the United States is not estopped may it, *at its pleasure,* require the district to surrender possession of the Federal lands and the structures on them without compensating the district for their value?

5. If the United States is not estopped and it does force the district to surrender possession of the Federal lands may the United States use the dam without compensating the district for the 1800 acres?

(h) Will the license be partly valid and partly void—*valid* as far as it gives the district the right to occupy the Federal land but *void* as far as it purports to subject the 1800 acres and transmission and pipe lines to loss by the district in the several ways specified in the Federal Water Power Act?

(i) If the license is void but the district enters under it, erects structures, and completes and operates the project—

1. Will the United States be charged in any way with a trust upon the "project" on behalf of the people of the district or the State of California?

2. Will the law raise any other sort of license between the district and the United States, and if so, what would be the terms of such other license?

(j) If in taking the license upon the only terms admissible under the Federal Water Power Act, the district exceeds its powers but enters under the license, erects structures and completes and operates the project, may the United States still hold the district to the terms of the license and the Federal Water Power Act?

(k) How far must the United States, through its agency, the Federal Power Commission, take notice of and be bound by limitations upon the powers of the district?

Now, as we assume that there are those limitations upon the powers of the district for which we contend, it is obvious that the answers to all these questions will determine—

First—whether or not the taking of such license in excess of its powers will subject the district to any disposition of its funds or properties contrary to its organic act; and

Second—what will be the extent of such unlawful disposition of its funds and properties?

Thus the proper construction and application of the Federal Water Power Act is directly involved. The right asserted by the plaintiff will be sustained on a construction and application of the Federal Water Power Act in one way in the many respects suggested and will be defeated by a construction and application

thereof in another way in the many respects suggested. Our case is then within the holding in *Carson v. Dunham,* 121 U. S. 421 at 427, where the Court said:

> "The suit must be one in which some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution, or a law or treaty of the United States or sustained by a contrary construction."

The district is bound to know and recognize all limitations upon its powers, whether imposed by statute or by general principles of public policy as established by law. The district has applied (as it must apply) to the Federal Power Commission for a license under the Federal Water Power Act to use certain Federal lands. The Courts must presume that such application is made in good faith without any intent to exceed any limits on the district's powers. Therefore the district necessarily contends, in view of the limitations upon its powers which we have found to exist, that the Federal Water Power Act, by proper interpretation and application, will not compel the district to do anything which will exceed such limits on its powers. We, on the other hand, contend that the taking of a license by the district under the Federal Water Power Act will compel the district to do many things beyond its powers and thereby to waste its funds and properties. And thus between these parties there is a square issue or controversy arising under the Federal Water Power Act.

In determining whether or not the Federal Courts have jurisdiction of a case on the ground that the

matter in controversy arises under the constitution or laws of the United States, the United States Supreme Court has declared that the following rules must be applied:

First (quoting from *Little York Gold Washing and Water Company, Limited v. Keyes,* 96 U. S. 199, 24 Law. Ed. 656 at 658):

> "A cause cannot be removed from a State Court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. *The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.*"

Second (quoting from *Binderup v. Pathe Exchange,* 263 U. S. 291, 68 Law. Ed. 308 at 314):

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; *and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven.* Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it. *Jurisdiction as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous; or, in other words, is plainly without color of merit.*"

Third (quoting from *Siler v. Louisville & N. R. Co.,* 213 U. S. 175, 53 Law. Ed. 753):

> "The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, *that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all but decided the case on local or state questions only.* This court has the same right and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit."

Naturally, we have not found an identical case. But there is a case very close to ours. It is *Smith v. Kansas City Title Co.,* 255 U. S. 180. The plaintiff, a stockholder in the defendant, brought the action to restrain the defendant from investing its funds in bonds of Federal Land Banks or Joint Stock Land Banks. The suit was brought in Missouri. Both plaintiff and defendant were citizens of Missouri. The claim was that such investment would waste the funds of the defendant institution because the act of Congress creating the obligors on the bonds was unconstitutional and so the bonds were void. "The bill avers that the defendant Trust Company is authorized to buy, invest in and sell government, state and municipal and other bonds, but it cannot buy, invest in or sell any such bonds, papers, stocks or securities which are not authorized to be issued by a valid law or which are not investment securities, but that nevertheless it is about to invest in Farm Loan Bonds." (Page 198.) In other words, the challenge was that the defendant *proposed to exceed its charter*

powers in making such investment in Farm Loan Bonds. But whether or not such investment would exceed its charter powers depended in turn upon the constitutionality of the act of Congress which created the obligor. And then upon what did the constitutionality of the act of Congress depend? It depended upon the powers and purposes of the banks which the act created. Said the Court (page 211):

> "We therefore conclude that the creation of these banks, and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds, brings them within the creative power of Congress, although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create those institutions."

Thus the constitutional question finally turned upon the construction and application of the act of Congress.

The Court itself and not the litigants raised the jurisdictional question and expounded its ideas in this language:

> "No objection is made to the Federal jurisdiction, either original or appellate, by the parties to this suit, but that question will be first examined. The company is authorized to invest its funds in legal securities only. The attack upon the proposed investment in the bonds described is because of the alleged unconstitutionality of the

acts of Congress undertaking to organize the banks and authorize the issue of the bonds. No other reason is set forth in the bill as a ground of objection to the proposed investment by the board of directors, acting in the company's behalf. *As diversity of citizenship is lacking, the jurisdiction of the district court depends upon whether the cause of action set forth arises under the Constitution or laws of the United States.* Judicial Code, Sec. 24.

The general rule is that, where it appears from the bill or statement of the plaintiff that *the right to relief depends upon the construction or application of the Constitution or laws of the United States,* and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction under this provision.

At an early date, considering the grant of constitutional power to confer jurisdiction upon the Federal courts, Chief Justice Marshall said:

> 'a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either,' Cohen v. Virginia, 6 Wheat. 264, 379, 5 L. Ed. 257, 285; and again when 'the right or title set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction.' Osborn v. Bank of United States, 9 Wheat. 738, 822, 6 L. Ed. 204, 224.

These definitions were quoted and approved in Patton v. Brady, 184 U. S. 608, 611, 46 L. Ed. 713, 715, 22 Sup. Ct. Rep. 493, citing Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 201, 24 L. Ed. 656, 658; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; White v. Greenhow, 114 U. S. 307, 29 L. Ed. 199, 5 Sup. Ct. Rep. 923, 962; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 139, 26 L. Ed. 96, 97.

This characterization of a suit arising under the Constitution or laws of the United States has been followed in many decisions of this and other Federal courts. See Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501, 506, 507 L. Ed. 300, 303, 304, 30 Sup. Ct. Rep. 184; Shulthis v. McDougal, 225 U. S. 569, 56 L. Ed. 1210, 32 Sup. Ct. Rep. 704. The principle was applied in Brushaber v. Union P. R. Co., 240 U. S. 1, 60 L. Ed. 493, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713 in which a shareholder filed a bill to enjoin the defendant corporation from complying with the income tax provisions of the Tariff Act of October 3, 1913. In that case, while there was diversity of citizenship, a direct appeal to this court was sustained because of the constitutional questions raised in the bill, which had been dismissed by the court below. *The repugnancy of the statute to the Constitution of the United States, as well as grounds of equitable jurisdiction, were set forth in the bill,* and the right to come here on direct appeal was sustained because of the averments based upon constitutional objections to the act. Reference was made to Pollock v. Farmers' Loan & T. Co., 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673, where a similar shareholder's right to sue was maintained, and a direct appeal to this court from a decree of the circuit court was held to be authorized.

* * * * * * *

The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, *maintaining that the act authorizing them was constitutional,* and the bonds valid and desirable investments. *The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity.*

> It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. *The decision depends upon the determination of this issue.*"

It can make no difference on the jurisdictional question whether the challenge of the suit is to the constitutionality of an act of Congress or to the interpretation, effect and application of an act of Congress which is admittedly valid. In each instance an act of Congress is directly drawn in question and the Federal courts have jurisdiction.

In the lower Court the defendants rested heavily upon three cases:

Blumenstock Bros. v. Curtis Pub. Co., 252 U. S. 436;

Owensboro Waterworks Co. v. Owensboro, 200 U. S. 38;

Norton v. Whiteside, 239 U. S. 144.

But these cases on their facts are so broadly distinguishable from the case at bar that a cursory reading will show their inapplicability and we need to make no argument whatever to this Court to distinguish them. We only notice them because it is our general policy to examine whatever our opponents have to say.

XI.

NATURE OF THE DECREE.

The decree in this case is general. It does not say whether it is made for want of jurisdiction or for

want of equity. If it is made for the first reason it cannot be made for the second one. The motion to dismiss was made upon both grounds. We must presume, then, that the decree of dismissal was made for want of equity.

But if this Court shall conclude that the decree is sustainable upon the ground of want of jurisdiction and shall decide not to pass upon the question of the equity of the bill, then we respectfully ask *that the judgment on appeal shall be specifically limited to the issue of want of jurisdiction.* Such limitation of the judgment will leave the plaintiff free to bring a suit in the state Courts on the merits; and he should be left free to do so if the Court determines not to pass on the equities of the case. As the record now stands the judgment is *res judicata* on the merits.

Dated, San Francisco,
October 16, 1926.

Respectfully submitted,
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